VIRGINIA LAW REGISTER

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The annual meeting of the State Bar Association will be held at the Homestead Hotel, Hot Springs, Va., August 4th to 6th, inclusive.

Virginia Bar Association.

In addition to an address by President W. R. Meredith, whose subject will be "Federal Control of Intrastate Commerce," there will be the following speakers: Hon. William Lindsay, formerly United States Senator from Kentucky (subject, "The Man and the Corporation"); Hon. Holmes Conrad, of Winchester, Va. (subject, "The Old Virginia County Court—Its Place in History"); Hon. A. C. Gordon, of Staunton, Va. (subject, "The Legal Foundations of Socialism"); and Judge Henry C. McDowell, of the United States District Court for Western District of Virginia (subject, "Some Misconceptions as to Federal Procedure").

The Hon. Wm. H. Taft, the nominee of the Republican party for President, has conditionally accepted the invitation to deliver the annual address, and it is to be hoped that he will do so.

The Bar Association of this state is composed of 552 members, of whom 489 are active. There are about twenty-five hundred lawyers in the state of Virginia. So that less than one-fifth of the members of the State Bar are members of the Association. The largest membership of any of the counties is from the extreme southwestern counties of Wise and Washington, Wise having 14 members; Washington, 13; Tazewell following with 12. Rockbridge has 11, Alleghany 9. Of the Eastern counties, Nansemond and Accomac lead off with 7 members each, the largest number of any county east of the Blue Ridge with the exception of Bedford, which has 8 members. Of the cities, Richmond, Norfolk and Staunton show the largest membership. Charlottesville, out of a bar of 23 lawyers, has eleven members. It seems to us that at least fifty per cent. of the lawyers in the

state should be members of this Association. Why is it that they are not? The Association was formed in 1888, and has now twenty years of experience. An examination of the annual attendance at its meetings show that at no time has as much as fifty per cent. of its members been present. The largest attendance was at Virginia Beach in 1894 when 185 out of 502 members attended. Low-water mark was reached at the Hot Springs in 1904 when but 87 out of 503 members attended. The average attendance for 20 years has been 140 ½ members—twenty-eight per cent. Has the Association justified its existence? Has it exercised the great influence which the worth, intelligence, ability and patriotism of its members might lead it to expect? One of the distinguished gentlemen, who is to address the present meeting, at the organization of the Association in 1888, in stating the need of such an Association, said:

"I understand one of the objects of this Association to be to have entrusted to it the recommendation of all such enactments as may be found to be needful to amend the existing law, or to provide for its omissions, that careful and intelligent regard may be had to the general policy of the Commonwealth and to the symmetry of its Code. A committee charged with the duty of ascertaining and observing the effect of the statutes and courses of judicial decision in other States and in England upon the various subjects of general legislation will certainly be a safer guide, subject to the revision of the Association, in directing and framing legislation than even the legislative committee of courts of justice with the manifold demands made upon its time and attention during the session of the body."

Year by year a committee has been appointed on legislation and reform. Legislatures have come and gone—legislation wise and otherwise—very frequently "other"—has been enacted. Has that committee thrown out a storm signal, or advised the general body in any way?

This distinguished gentleman at the same meeting said, speaking of breaches of legal ethics and sharp practices by unworthy lawyers:

"One who attempts by exposure and denunciation of such practices only exposes himself to the suspicion of being controlled by personal malevolence or other base motive. No one member of the bar regards it as his personal duty to expose the offender and bring him to justice. This evil can only be cured by making

it the official duty of lawyers as members of this Association, to bring all such cases to the attention of an appropriate committee, who shall have power o make thorough investigation and impose adequate punishment."

Has the Association ever brought to trial an unworthy member or used its influence to investigate and punish unprofessional conduct? Of course we hope that no such unworthy person is in the ranks, and verily we do believe that no higher class of men can be found on the face of the earth than the Virginia Lawyers (we say this in all seriousness, and fully aware of the gravity of such a statement). And yet are there not some in the ranks of the profession whom a little judicious discipline might help?

Two important amendments to the laws have been made, directly traceable to the work of this Association. One is the present requirements for license to practice law. Another the passage of the Act known as "The Negotiable Instrument Law." An effort has been made to improve our archaic and illogical system of practice. The committee appointed for that purpose did excellent and hard work, but the association rejected its report. The effort was repeated at the last meeting, and a report is to be expected at the present meeting, which may at least lead to discussion. As a social feature the meetings of the Association have always been delightful, and we think of very great use in bringing together lawyers from every portion of the Commonwealth. The addresses made and papers read have been of an uniformly high character, many showing deep research and wide learning. A collection of the volumes of the proceedings should be in every Virginia lawyer's library and an examination of their contents will lead to the perusal of many of the timely and able articles. The banquets have been brilliant affairs though in many instances the postprandial speeches have not "leaned to mercy's side," as far as length was concerned. On the whole no one can question the great use, not to speak of the pleasure, of the annual gatherings. But the Association owes it to itself to do more in the future than it has done in the past. It has a great power. It should be used wisely as well. We suggest one way in which vast good might be accomplished. Let the commitee on legislation and reform be enlarged to a membership of twelve. Let it be its duty to obtain a copy of every bill intro-

duced and printed in the Legislature which may affect the general laws of the state. Let each bill be examined and its effect upon the law as enacted, or proposed to be changed, noted, and then through the public press and through each committeeman's representative and senator let attention be called to any legislation which may be vicious, unwise, or which may lead to conflict and confusion in the law. Two objections may be urged to this. One the amount of work involved. By judicious distribution of the bills amongst the members of the committee, we think this work would be reduced to a minimum, and we do not believe the members should shrink from the task. The other is that the General Assembly might consider this a reflection upon its ability and wisdom and resent it. We do not believe this. On the contrary we believe the wise and conservative members of that body would welcome such aid. Under the present system, the work of our General Assembly is crowded into such a narrow space that careful consideration of much proposed legislation is rendered almost impossible. Could judicious counsel and advice be given, we believe it would be patiently heard and cordially received. Another direction in which much good might be accomplished, would be in an effort to arouse concerted action for uniformity of laws on many subjects, such as Divorce; The Law of Sales, etc. And again, to have drawn up and adopted and referred to the next General Assembly either a radical and complete change in our common-law practice, or such amendments as will correct some of its most palpable errors. The following changes have been suggested:

(1) Amend motion statute so as to include tort actions.

(2) Or amend the demurrer statute so as to overcome the Hortenstein case.

(3) Abolish distinction between sealed and unsealed instruments.

(4) Amend statute demurrer to evidence by requiring facts to be admitted in writing, or the demurrant to abandon all of his evidence, oral or documentary.

(5) Demurrer to declaration—call attention to statute in connection with Hortenstein case.

(6) In an action of tort, no plea of contributory negligence

shall be allowed where the evidence tends to show that some statute or ordinance has been violated.

(7) Let appeal records be cut down by only stating the substance and not the whole record—questions and answers.

These are but indications of what might be done if the Association went to work, as a body. Doubtless there are many other directions in which its usefulness can be extended. Is not this an excellent time to begin active work, so that another two decades shall not pass without a greater showing of greater usefulness?

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107 Virginia.

Volume 107 of Virginia Reports is upon our table. One hundred and twenty-four cases are reported; of these, 101 are civil and 23 criminal. Of the civil cases, 49 are affirmed, 50 reversed, and 2 reversed in part. Of 17 criminal cases, 12 are reversed and 1 affirmed. In 2, writs are dismissed; in one the prisoner is discharged under a writ of Habeas Corpus, and in Hanger's Case the prosecution is dismissed as to Hanger, reversing the lower court in this respect, but affirming its judgment as to the annulment of the charter of a so-called social club. In this latter case the court again lays down the salutary rule that where it plainly appears the verdict of the jury could not have been other than it was, the court will not consider the ruling of the trial court in granting or refusing instructions. Amongst the civil cases reported, many are of great importance and novelty. We have either reported in full with annotations or digested all the cases in this volume in the pages of the THE REGISTER, and therefore will not further comment upon them. The large number of reversals in matters of criminal appeal seem to call for some notice and we therefore briefly mention the cases. We do not think that the numerous reversals are open to adverse criticism, though we do not agree with the conclusions of court in Yoder's Case, and think there may well be doubt as to whether the dissenting opinions in Wells *v.* The Commonwealth and Wilson *v.* The Commonwealth are not justified. It is a remarkable and pleasing fact that not a single dissenting opinion is to be found in any of the civil cases, though in the case of The Southern Railway Company *v.* The

Commonwealth, JJ. Whittle, Buchanan and Harrison delivered separate opinions upon the question raised as to Rule 1 of the State Corporation Commission.

Yoder's Case: A decision on the question of contempt. We commented upon in Vol. 13, page 320, of THE REGISTER.

In the case of Hill *v.* Smith, Sergeant, the prisoner, was discharged because held merely as a "suspicious character." We have previously, in Vol. 13, page 812, of THE REGISTER, commented upon the great value of this excellent decision.

The writ of error in the Midget Case was dismissed on account of improper certification of the bills of exception.

In Wells *v.* The Commonwealth and Puckett *v.* The Commonwealth, the court holds that the violation of the Sabbath law is not a misdemeanor and reverses the lower court. Buchanan and Harrison dissent in this case.

In Forbes *v.* State Council of Virginia, J. O. U. A. M., the appeal was dismissed, the court holding that a fine for contempt of court with imprisonment for failure to pay, does not involve the life or liberty of any person within the meaning of § 88 of the constitution. The court in this case also holds that it is without jurisdiction to revise the judgment of an inferior court imposing a fine upon a party to a suit for disobedience of its orders and directing his imprisonment in default of payment.

In case of Devine *v.* The Commonwealth, the judgment of the lower court was reversed because the preponderance of evidence showed in the opinion of the upper court that the cider did not contain a greater percentage of alcohol than is allowed by statute.

Fields *v.* The Commonwealth was also reversed because in the opinion of the upper court the evidence was not only insufficient but the methods resorted to by an amateur detective were in the opinion of the court "so flagrantly reprehensible that their sanction would bring reproach upon administration of justice." Something which might well be said of methods not entirely amateur.

Richards *v.* The Commonwealth was reversed upon two grounds; one, in directing a jury to be summoned from another county when the case does not show it would have been inconvenient to have obtained qualified jurors from the county in which the crime was committed. The other was an error in ad-

mitting certain declarations of the deceased. An important question, and one of first intention in this State, is decided in this case. The notes of the trial judge taken at a former trial of the case were asked to be used to contradict a witness introduced by the Commonwealth. The lower court declined to allow these notes to be used, and the Supreme Court, citing 3 Wigmore on Evidence, § 1666, and cases cited in Note 1, affirmed the decision of the lower court. This decision, whilst sustained by ample authority, does not seem to us to be justified by any rule of right reason. It is true that such notes are not taken in the discharge of any official duty, but certainly a judge taking notes in a criminal case, even for his own private convenience, should be supposed to have taken them in a semi-official capacity and to have exercised due and reasonable care in so taking such notes. If therefore, at the second trial, a witness had made absolutely contradictory statements from those shown in the judge's notes at the first trial, what rule of common sense or of right reason should prevent their use to show such false and contradictory statements?

In Woodson *v.* The Commonwealth, the case was reversed because the evidence did not sustain the charge. We commented upon the strong dissenting opinion of Judge Whittle in this case in Vol. 13, page 983.

White *v.* The Commonwealth was reversed for an error in instructions.

Haite *v.* The Commonwealth reversed upon a question of law.

The Case of Uzzle *v.* The Commonwealth was reversed because in the opinion of the Supreme Court there was such local prejudice that a change of venue should have been granted, and Burton's Case was upon the same ground.

In Scott *v.* Chichester, the court held that there could be no parole by a judge of a court of a prisoner under sentence during good behavior and then a remanding to jail to serve out the original sentence, without counting the period during which he was out on parole, and the lower court was reversed because it held otherwise.

The first Court of Criminal Appeal ever known to the English Law and which was authorized by an Act of Parliament, 7 Edw.

The Court of Criminal Appeal In England.

VII, c. 23, passed sometime since, held its first sitting a few weeks ago. Appeals may now be had on any question of law alone, and, with leave on a question of fact or a mixed question of law and fact or on any other ground which appears to the court sufficient, and the convicted person may, with leave, appeal against the sentence pronounced, unless it is one fixed by law.

Unusually wide powers are given this appellate tribunal in dealing with questions of fact and such questions as in our state are usually left to the discretion of the trial judge. The Appellate Court may affirm a conviction if satisfied "that no substantial miscarriage of justice has actually occurred," no matter how many technical errors have been committed—a most wise and salutary provision, it seems to us, and worthy of adoption everywhere.

It may quash a conviction and direct a judgment and verdict of acquittal or make such modification of the lower court's sentence, as seems to it proper, whenever satisfied that there has been a miscarriage of justice.

Our English brethren are slow in their way of doing things—especially in matters of law reform. But when they do things, they do them exceedingly well. It seems to us that the plan of this court is excellently conceived and if the judges who compose it are wise men of broad minds, bold to do the right thing, yet not too bold, its decisions will be of distinct value not only in the furtherance of justice, but in setting precedents.

We have often thought that an ideal Appellate Court would be one clothed with wide discretionary powers, as to remanding a case or finally settling it. Take the case of Fields *v.* The Commonwealth, referred to above. How much expense and waste of time could have been saved, if the court, instead of reversing the lower court and remanding the case for a new trial, could have simply entered an order declaring the prisoner not guilty and discharging him from custody. This is bound to be the result of a new trial in that case as any one can see who reads the opinion. The fear which has been expressed in some quarters that there may be too much revision of verdict and that the present jury system may be weakened, is, in our opinion, groundless, if the judges who sit are like most of the English judges—

men learned in the law, without maudlin sympathy for criminals, but with a keen and high sense of right and justice.

The following from the London Law Journal shows some of the work of this Court:

At the sittings of the Court of Criminal Appeal on July 3 one appeal was allowed, Rex *v.* Tate, a conviction under § 61 of the Offenses against the Person Act, 1861. The ground for quashing the conviction seems to have been that the uncorroborated evidence of an accomplice was the main, if not the only, evidence against the appellant.

In Rex *v.* Hawes, an appeal against sentence on conviction of larceny, the Court reduced a sentence of twenty-one months' hard labor to a sentence of twelve months, to date from the conviction. The offense in question had been committed six years ago and before another offense of the same kind (stealing a horse and cart), for which the appellant had been sentenced to four years' penal servitude. It is difficult to follow exactly why the sentence was reduced, whether the penal servitude could be considered as clearing the prisoner's sheet of earlier offenses, or whether the fact of getting penal servitude for stealing one pony and cart entitled the prisoner, as Mr. Justice Darling said, to a reduction "on taking a quantity."

In Rex *v.* Martin leave was given to appeal against a conviction of highway robbery and to call certain named witnesses on a question of identity. In Rex *v.* Coleman, where leave had been given to call additional witnesses, it was intimated that where counsel decided to call them, arrangements must be made to procure their attendance on the day fixed for the hearing of the appeal.

In Rex *v.* Spencer, an appeal against a sentence of twelve year's penal servitude in respect of three burglaries, as to two whereof the appellant had been convicted and to the third he pleaded "Guilty," the Court refused to reduce the sentence. There was evidence that the appellant had fitted himself out with an up-to-date set of burglars' appliances, that there had been an epidemic of burglary in Leiceser, and that a jemmy found among the prisoner's tools fitted marks made at fifteen houses broken into in Leicester. The appellant seems to have qualified for detention as a danger to society.

None of the other cases call for notice except Rex *v.* O'Sullivan,

an appeal against a conviction for stealing rings. In this case the Court followed the rule laid down in Rex *v.* Meyer. The probable test in determining whether there has been a miscarriage of justice is "that the facts proved would be consistent with innocence and not consistent with guilt."

Victorian Chancellors.

Nearly every law library of any pretensions has Lord Campell's "Lives of the Chancellors and Chief Justices" on its shelves. Inaccurate and prejudiced, they are yet most delightful reading and created a new form of legal biography. Few who own these volumes will not desire to have the "Lives of the Victorian Chancellors," by I. B. Atlay, the second and last volume of which has just been published by Smith, Elder & Co. Lacking in some respects the fascinating methods of Campell, these volumes give us in a clear and excellent style lives which to all lawyers must prove most interesting. The study of the lives of English lawyers who have risen to great prominence does much to destroy the idea so often expressed that America is the only land of opportunity. Several of the Victorian Chancellors rose from comparative obscurity and poverty to the highest office of the Government, from the lawyer's standpoint. Lord St. Leonards, like Lord Tenterden, was the son of a barber. Chelmsford was a midshipman in early life. The record of their lives indicate that perseverance, hard work, and devotion to their profession were the secrets of their success, if such apparent things can be called secret.

One is struck in reading of the lives of these men, with their power of intellect coupled with courage of conviction, and with a fearlessness as to result, so that the right was reached. Barring Brougham, whose audacity was only equalled by his charlatanry and surpassed by his brilliancy; and possibly Campbell, whose vanity and snobbishness marred an otherwise remarkable career, the great Queen had upon the woolsack great lawyers and high, pure-minded gentlemen, worthy of the highest gift of any nation. One only—Westbury—fell into disgrace, and his fall was not one entirely to his discredit. Lack of worldly wisdom, rather than moral fault, caused his misfortune. His tongue was venomous, and wit as keen as man's well could be. He, like

Solomon—and Dr. Wm. H. McGuffey—hated a fool, and woe to the fool who crossed the path of his temper. Some of his sarcasm is worth repeating. A timid junior once said to him as he sat down after a brilliant argument: "I think you have made a strong impression on the Court." "I think so too," he replied. "Do nothing to disturb it." A brother barrister thundered out an oration, and when Westbury—then plain Mr. Bethel—arose, he said: "Now that the noise in Court has subsided, I will tell your honor in two sentences the gist of the case."

Lord Justice Bruce was impatient: "Your Lordship will hear my client's case first, and if your Lordship thinks it right, your Lordship can express surprise afterwards."

"Take a note of that," he said once; "his Lordship says he will turn it over in what he is pleased to call his mind."

He and Bishop Wilberforce—"Soapy Sam"—hated each other, the one with the hatred of a good honest hater, the other with that sanctimonious, up-turned-eyes, godly "sorrow," which made up in bitterness what it lacked in honesty. Westbury is said to have treated the Episcopal Bench "as the Almighty might treat refractory black beetles."

"I would remind your Lordships," he once said, "that the law in its infinite wisdom has already provided for the not improbable event of the imbecility of a bishop."

We know of no other book with which a young lawyer can so well combine profit and amusement, and which will afford to the older brethren more pleasant reading.